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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 236

JOSEPH K. TAUSSIG, JR., *Petitioner,*

v.

ROBERT S. MCNAMARA, Secretary of Defense, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOSEPH K. TAUSSIG, JR., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 6, 1964.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit entered no opinion. The United States District Court for the District of Columbia entered no opinion in granting defendants' motion for summary judgment and dismissing the action. The

opinion of the District Court in denying petitioner's motion to convene a three-judge court is reported at 219 Fed. Supp. 757, (JA 28 et seq.).

JURISDICTION

The judgment of the court below was entered on February 6, 1964. The jurisdiction of this court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of a regulation issued by the Secretary of Defense (DOD 5500.7, dated May 17, 1963) barring retired officers of the regular military service permanently from the business of representing persons in the sale of anything to the service from which they were retired and requiring them to file a statement reciting that their duties do not involve selling to the government in violation of the statutes and policies set forth in the said regulation is in excess of an in contradiction to the statutory and constitutional authority of the Secretary of Defense.

2. Whether 18 U.S.C. 281 as applied to petitioner is unconstitutional as violative of his rights under the Fifth Amendment.

3. Whether a suit against the Secretary of Defense, the Secretary of the Navy, and the Attorney General by a retired officer of the regular Navy seeking judgment declaring that the said directive and the enforcement thereof is in excess of and in contradiction to the statutory and constitutional authority of these officials is an unconsented suit against the United States.

4. Whether the cause presents a justiciable case or controversy and whether the petitioner has standing to sue in the premises.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved are set forth in Appendix B, *infra*, pp. 1a to 8a. They are:

1. The constitutional provision involved is Amendment V, Constitution of the United States.

2. The statutes involved are 18 U.S.C. 281, as amended; Act of June 13, 1940, 54 Stat. 350, 355; Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361).

3. The regulation involved is Department of Defense Directive 5500.7, dated May 17, 1963, 28 Fed. Reg. 5666 (1963).

STATEMENT

This controversy arose because of the promulgation by the Secretary of Defense of a directive prohibiting retired officers of the regular military services permanently from representing anyone in the sale of anything to the service in which they hold their retired status (DOD Directive 5500.7, 28 Fed. Reg. 5666 (1963)). The petitioner, Joseph K. Taussig, Jr., is a retired officer of the regular Navy who was retired on August 31, 1954 with the rank of Captain for permanent disability (80%) resulting from wounds received in the Japanese attack on Pearl Harbor (JA 38). His business and means of livelihood is that of representing firms, corporations, and companies which sell materials and supplies to the departments of the Armed Services of the United States. The effective performance of this business or profession requires that he contact officers and employees of the federal depart-

ments for obtaining and negotiating contracts, prices, cost allotments, or other terms of contract activity or liaison activity looking forward to the ultimate consummation of sales (JA 43, 44). The directive hereinabove mentioned prohibits him from conducting his business with the Department of the Navy (JA 44). The prohibition has in the past caused and is presently causing him serious financial loss, rendering him uncompetitive with other citizens of the United States who are not so prohibited (JA 44) and occasioning the loss of clientele (JA 43). He is also harmed because in the conduct of his business he is unable to tell by reason of inter-service connection in procurement matters whether or not he is, in given circumstances constantly arising, in violation of law (JA 44). Specifically, the prohibition contained in the directive arises because the Secretary of Defense in the directive interprets a provision of the criminal code, 18 U.S.C. 281, as meaning that the Congress has declared such "selling" by retired officers to be a criminal offense. The directive itself not only prohibits the petitioner from engaging in such activity but requires (see § XIII D2a, App. B, *infra*, p. 5a) that he file a statement reciting that his duties "do not involve selling to the government in violation of the statutes and policies cited in the regulation received" (DD Form 1357, App. B, *infra*, p. 8a). In order to seek judicial remedy petitioner filed suit in the United States District Court for the District of Columbia against the Secretary of Defense, the Secretary of the Navy, and the Attorney General seeking preliminary injunction and a declaratory judgment holding the regulation to be a nullity and 18 U.S.C. 281 to be unconstitutional and for a further declaration that the construction made by defendants of 18 U.S.C.

281 in the DOD Directive was in error and that the statute as correctly construed did not impose criminal penalties on regular retired officers who represented persons in sale to the department in which they held their retired status (JA 10, 11, 46). The complaint alleged *inter alia* that the Secretaries of Defense and the Navy had exceeded their constitutional and statutory authority in the premises (JA 7, 9) and that 18 U.S.C. 281 was unconstitutional as vague and indefinite (JA 7). In regard to the preliminary injunction petitioner moved for the convocation of the three-judge court. The defendants opposed and moved to dismiss or in the alternative for summary judgment, both of said motions resting on the ground that the court lacked jurisdiction over the subject matter by reason of lack of standing to sue and failure to present a case or controversy (JA 18). The lower court denied the motion for a three-judge court filing an opinion in connection therewith (JA 28). The appellant moved to reconsider this order and moved for summary judgment. The District Court by fiat denied the motion to reconsider and by order granted appellees' motion for summary judgment and dismissed the action (JA 47). The petitioner then appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals on April 6, 1964, entered a judgment reciting:

> "* * * that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed. See *Kennedy* v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 F. 2d 181 (1963), affirmed on other grounds, ... U.S. .... (March 30, 1964)."

This petition for certiorari followed.

The District Court had jurisdiction in this action under the Declaratory Judgment Act, 62 Stat. 964, as

amended, 63 Stat. 105, 28 U.S.C. 2201, 2202; and under the Administrative Procedure Act, 5 U.S.C. 1009; and under Secs. 11-305, 306, D. C. Code (1961 ed.).

The Court of Appeals had jurisdiction to hear the appeal under provisions of 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

The writ should issue because the United States Court of Appeals for the District of Columbia Circuit has, through the erroneous use of the jurisdictional doctrine of the unconsented suit against the United States, in conflict with applicable decisions of this court, affirmed the dismissal of a cause presenting a substantial question of federal law which has not been, but should be, decided by this court. The substantial question is whether or not a directive of the Secretary of Defense barring retired officers of the regular military service for life from the legitimate business of representing persons in the sale of anything to the service from which they were retired is in excess of and in contradiction to the statutory and constitutional authority of the Secretary of Defense. The cause has twice erroneously suffered dismissal on threshold grounds. The United States District Court for the District of Columbia dismissed the cause on summary judgment on the ground that the court lacked jurisdiction over the subject matter for failure of standing or the absence of case or controversy. The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court by per curiam order citing, however, its own decision in *Kennedy* v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 Fed. 2d 181, which it had determined on the ground of unconsented suit against the sovereign. The dismissal of such an action

on this threshold theory of federal jurisdiction not only uses again a highly questionable[1] concept which this Honorable Court specifically declined to pass upon or use as a basis of decision in its own review of the same case, *Rabinowitz* v. *Kennedy*, ... U.S. ...., 32 L.W. 4264 (March 30, 1964), but expanded it to cover circumstances involving administrative action in excess of statutory and constitutional powers in contradiction to established decisions of this court. Such a situation has never given rise to the doctrine of unconsented suit nor precluded suits against officials so acting in excess of constitutional or statutory authority, *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951)); *Stark* v. *Wickard*, 321 U.S. 288, 290; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94. This right to sue federal officials has been applied in such a far-ranging variety of circumstance that it cannot now be even subject to debate. See, e.g., the validity of a harbor line set by the Secretary of War, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605; classification of a railroad by the Interstate Commerce Commission, *Shields* v. *Utah R.R. Co.*, 305 U.S. 177; the issuance of passports by the Secretary of State, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 331; *United Public Workers* v. *Mitchell*, 330

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[1] See Borchard, *Declaratory Judgments* (2 ed. 1941) at 906, 1020, 1021; Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445 (1943); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damage*, 40 Cornell L.Q. 3 (1954); Davis, *Suing the Government by Suing an Officer*, 29 U. Chi. L. Rev. 435 (1962); Jaffe, *Suits Against the Government and Officers; Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

U.S. 75; character of an Army discharge, *Harmon* v. *Brucker,* 355 U.S. 579; the classification of hearing examiners, *Ramspeck* v. *Fed. Trial Examiners,* 345 U.S. 128; veterans' preferences in retention in government service, *Hilton* v. *Sullivan,* 334 U.S. 323; the lease of public lands, *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U.S. 621; test affecting the import of tea, *Waite* v. *Macy,* 246 U.S. 606.

Particularly is the doctrine inapplicable to the peculiar circumstances of this case. Here the appellant, a retired naval officer, has been and is being prevented, to his irreparable injury, from engaging in his chosen legitimate profession by an order of the Secretary of Defense, implemented by an instruction of the Secretary of the Navy, prohibiting him as a retired officer from representing anyone in the sale of anything to or through the Navy Department.[2] This prohibition is special, and in addition to the strictures of the comprehensive Conflict of Interest Statute which apply to the appellant and to all other citizens who have in the past served the United States on active duty in or out of uniform. (P.L. 87-849, 87th Congress, 76 Stat. 119). The Secretary of Defense does not himself purport to have originated such a ban but sets it in his directive because he believes that the Congress has by a Conflict of Interest Statute declared such act of selling by a regular retired officer to be a criminal offense (18 U.S.C. 281). Having thus placed the blame upon the Congress, the Secretary then takes his own steps administratively to enforce his interpretation of the statute independently of any action connected with a criminal prosecution. He specifies the acts and con-

[2] DOD 5500.7 dated May 17, 1963, 28 Fed. Reg. 5666 (1963); SEC. NAV. INST. dated 6 June 1963.

duct which he believes that the criminal statute prohibits. He then orders regular retired officers to forbear from the acts which he believes prohibited by statute and orders each such officer to file a statement declaring that he is not violating the provisions, and listing his employers, his employers' products, his title, and his duties.

At least a partial purpose of the action is obviously to place a retired officer who might be "selling" in the dilemma of subjecting himself to court martial for refusal to obey an order if he does not sign or cannot without perjury sign such a statement, and to incriminate himself in violation of Fifth Amendment rights, and to incriminate his employer and subject himself to perjury indictment, if he does. Since the Secretary is also the buyer of the materials involved in any relevant sale and the accuser in any prospective court martial, the absolute effect of the promulgation of the order on the individual retired officer is obvious.

A review of the statute shows that the Secretary's interpretation is wrong under the canons of statutory construction, the ordinary standards of constitutional interpretation, and the legislative history; that the error of the Secretary is the fundamental one of finding that the Congress has created a crime tailored only to the regular retired officers of the military service where the Congress cannot have constitutionally intended to do any such thing; that the Secretary's interpretation of the statute renders it unconstitutional, as vague, indefinite, and discriminatory; and that the administrative application to him of the statute as so interpreted is in excess of the Secretary's powers and violates appellant's rights under the Fifth Amendment to the Constitution.

The crux of the problem can be briefly described. The statute which the Secretary of Defense interpreted and applied in his directive to bar the appellant from his means of livelihood recites as follows:

> "Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer, or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United Sattes.
>
> *"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.*
>
> "This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress." [June 25, 1948, c. 645, § 1, 62 Stat. 697; May 24, 1949, c. 139, § 6, 63 Stat. 90; *repealed* by Act Oct. 23, 1962, P.L. 87-849, § 2, 76 Stat. 1126, "*except as* [*it*] *may*

apply to retired officers of the armed forces of the United States."] (Emphasis added.) 18 U.S.C. 281

The first paragraph is, of course, the text of the old Conflict of Interest Act of June 11, 1864, (13 Stat. 123). The first two italicized sentences are an amendment added in 1940 (54 Stat. 1021), occasioned by the holding of the United States Court of Appeals for the District of Columbia that retired officers of the regular services were "officers" within the meaning of the old statute, *Morganthau* v. *Barrett*, 71 App. D.C. 148, 108 F. 2d 481, cert. den., 309 U.S. 672 (1939), and the final italicized sentence with its speculative verb "may" is the 1962 repeal. The contradictory nature of the two sentences of the 1940 amendment with the use of the permissive verb "allow" in the second sentence have given rise to two antithetical interpretations within the Department of Defense itself. One is that expressed by the Judge Advocate General of the Navy in 1959,

> "Now, in construing this and interpreting it for the Navy, I have held that it is not a prohibition. It is, in effect, a saving clause, to protect the civil statutes which prohibit the sale—the participation of retired officers in selling to agencies of the Department of Defense."[3]

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[3] Testimony of Rear Admiral Chester Ward, Judge Advocate General of the Navy, before the hearings, Subcommittee for Special Investigation, House Committee on Armed Services, 86th Cong., 1st Sess., at 944 (1959) (the Hebert committee); see also Op. JAGN JAG:134.2 PEH:AN May 16, 1960; Op. JAGN 134.1:RWC:sb July 12, 1962; and *Reference Guide to Employment Activities of Retired Naval Personnel*, published by the Department for the Navy, Office of the Judge Advocate General, 21 March 1963, p. 21.

The Navy JAG is here referring to two civil statutes which had for years come before the attention of the Congress in the process of re-enactment or amendment and which provided that retired officers would not be paid their retired pay during any time that they were engaged in selling material or supplies to the service from which they were retired.[4]

This interpretation was reinforced by the language of the committee report on the 1940 amendment (H.Rep. 2330, 76th Congress, 3rd Session) which after referring to the second sentence,

> "The amendment by the committee is intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department. It applies only to representation in the actual sale of goods, and does not apply to employment and the other activities of any corporation or other persons such as manufacturing."

went on to describe the effect intended for the whole amendment in language completely disavowing any

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[4] "• • •

No payment shall be made from money appropriated in this Act to any officer on the retired list of the Army who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Army, or the War Department any war materials or supplies. • • •"

Military Appropriation Act of 1941, Act of June 13, 1940, 54 Stat. 350, 355

"• • • That no payment shall be made from appropriations made by Congress to any retired officer in the Navy or Marine Corps who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Navy or the Navy Department any naval supplies or war material." Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361).

leglislative purpose to create or continue application of the criminal code in special detail to retired officers of the regular service,

"The only effect of this bill will be to extend to retired officers not on active duty the same exemptions from the operation of Section 113 as were extended to Reserve officers by the Act of July 1, 1930 (46 Stat. 841).

"This bill does not involve any expenditure by the Government nor will its enactment jeopardize any interest of the Government. Though a part of the Military Establishment, retired officers not on active duty—the only class to which this bill applies—are more nearly in a civil than a military status. They have no military duties to perform and though in time of war they may be called to duty without their consent, this is a contingency to which every citizen is subject. In time of peace, their status is no different from that of citizens generally. And as said by the Court of Appeals, their 'activities are wholly separated from official life.' It is absurd, therefore, to think that retired officers, particularly while not on active duty, as such, can exert any undue influence in the departments or bureaus, or with commissions, agencies, or instrumentalities of the Government, or with any officer therewith connected. The time of retired officers not on active duty is their own. There is no loss of time to the Government, through their employment by private interests, as there is in the case of officers and employees on active duty whose whole time belongs to the Government. As the primary purpose of the statute seems to be to discourage the use of undue or sinister influence by those in a position to exert it, and to prevent the loss to the Government of time for which officers and employees are paid by the Government, and neither of these reasons can have any application to retired officers

not on active duty, there appears to be no good reason why they should not be exempted from the provisions of Section 113 of the Criminal Code, as proposed in this bill."

The other interpretation is that upon which the current directive of the Secretary of Defense is based. It imputes to the Congress the intent to classify the retired officers of the regular services into a special category different from reserve officers not on active duty, from other retired personnel of the federal service of any variety, and different indeed from any other citizen not in the active service of the United States. It presumes a congressional purpose to find in the case of the regular retired officer a singular, class disposition to the use of undue or sinister influence sufficient to require the imposition of severe criminal penalties. It should be a sufficient answer to note that the legislative report hereinabove quoted specifically denies any intent on the part of the Congress to attribute such an evil disposition to retired officers not on active duty, or to discriminate against them in this regard without basis in violation of their Fifth Amendment rights. Furthermore, if it were fair to assume that the interpretation of the Secretary was tenable as an abstract matter it would still make no difference. In that event there would exist two interpretations reasonably held and every interpreting authority, be it court or administrative official, would be compelled on constitutional grounds to reject the construction which creates a criminal offense in favor of the interpretation which does not.

"* * * Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a common sensical meaning. But

> when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal CIT Credit Corp.*, 344 U.S. 218, 221, 222, 73 S. Ct. 227; see also *Connolly* v. *General Construction Co.*, 269 U.S. 385, 392.

In further demonstration of the ambiguous character of the statute, it is noted that virtually every administrative official cognizant of the problem has either conceded the ambiguity,

> "The statutes are confusing and I believe could be clarified. But I understand they over-run into a whole series of other laws. I do feel they are somewhat ambiguous. * * *"
>
> Testimony of Deputy Secretary of Defense Thomas F. Gates, Hebert Committee Hearings, supra, p. 11.

or declared themselves incapable of solving the controversy involved,

> "SENATOR ERVIN: I am not quite familiar with the proposition, but I received a communication from a retired military officer objecting to certain passages of the bill, and indicating that the situation respecting retired officers should be clarified.
>
> "I was unable to be here when you began your testimony and do not know whether you touched on that—"
>
> "MR. KATZENBACH: I testified only, Senator, that we left the situation of retired military officers exactly where it stood. Now to be perfectly candid about that, we did so because it has been a matter

of controversy for some time and we did not feel capable of resolving that problem. So, we left it as is."

> Testimony of Deputy Attorney General Nicholas DeB. Katzenbach (Hearing before the Committee on the Judiciary, U.S. Senate, 87th Congress, 2nd Session on H.R. 8140 (1962) at page 29.)

or presented a theory of curing ambiguities in the criminal statute through the device of administrative definition of questionable terms.

> "As this Committee well knows, one of the most serious problems involved in the conflict-of-interest area is determining those activities which constitute a sale. Sec. 281 uses the term 'sale' without any further elaboration and as far as we know this term has never been judicially construed. After careful consideration, the Air Force, approximately 10 years ago, adopted the following regulation for guidance. This is Para. 5(b) of Air Force Regulation 3030, and it is on the Air Force Blue Tabs, No. 2, in that digest (quoting same). It will be noted that this definition is quite close to the definition of selling activities recently given by the Comptroller General in the case of the Navy beer salesman (38 Comp. Gen. 470).
>
> "Admittedly, these definitions are not precise and would not be appropriate for inclusion in a criminal statute. Our best view is that perhaps the matter of definition should be left to regulation."
>
> Testimony of Mr. Max Golden, General Counsel of the Department of the Air Force, before the Hebert Committee, supra, p. 967.

The only support by the judiciary for the criminal interpretation of 18 U.S.C. 281 as applied to re-

tired officers is found in *Gillilan* v. *U. S.*, (2d cir.) 288 Fed. 2d 796, cert. den. sub. nom. *Apex Distributing Co. Inc.* v. *U. S.*, 368 U.S. 821, in which the court, however, reversed the conviction for the reason that the lower court had not defined "selling" in its charge to the jury. The court, however, did not assist by any definition of its own in this regard.

It is submitted from the foregoing that no conceivable question of sovereign immunity is presented. The Secretary of Defense cannot be considered the alter ego of the sovereign when he attempts by administrative order to create a crime where the Congress had intended no crime to exist or where he applies a statute, which as interpreted by him, is unconstitutional. Certainly, the fact that there is involved a criminal rather than a civil statute creates no problem of sovereign immunity. *Philadelphia Co.* v. *Stimson, supra; Shields* v. *Utah R.R. Co., supra.* The only problem arising from the fact that a criminal rather than a civil statute is involved in an equitable proceeding is that of adequacy of remedy at law in a criminal trial. Here, however, there is no adequate remedy at law for it is the force of the administrative prohibition against selling which inflicts the injury independent of any question of criminal prosecution. Should the doctrine of sovereign immunity insulate an administrative official from suit in such an instance it would be tantamount to countenancing the administrative equivalent of a bill of attainder, *U. S.* v. *Lovett,* 328 U.S. 303.

Neither are the grounds of failure of standing or lack of case or controversy, which the District Court adopted, of any merit.

This appellant has standing to sue in that his stake in the argument is personal, *Baker* v. *Carr,* 369 U.S.

186; he is deprived of a valid property right, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86; in his means of livelihood, *Truax* v. *Raich*, 239 U.S. 33; and in his business or profession, *Green* v. *McElroy*, 360 U.S. 474. He has as well been ordered from time to time to sign a statement, vague and uncertain in character, that he is forbearing from doing what the Secretary has in error and in excess of law prohibited, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Baggett* v. *Bullitt*, — U.S. —, 32 L.W. 4425 (June 1964). The effective prohibition is current and active rendering his case ripe for decision. In summary the theories adopted by the lower court in dismissing the action of the appellant on threshold jurisdictional grounds constitute clear error. The cause is one of substance which should be heard on the merits and determined on the merits by this Honorable Court.

Respectfully submitted,

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APPENDIX A

Judgment Below

Filed and Entered, April 6, 1964

[Caption omitted]

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges.

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed. See *Kennedy* v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 F. 2d 181 (1963), affirmed on other grounds, — U.S. — (March 30, 1964).

Per Curiam.

APPENDIX B

Constitutional Provisions, Statutes and Regulations Involved

1. Amendment V, Constitution of the United States, is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. 18 U.S.C. 281, as amended is as follows:

"Section 281. Compensation to members of Congress, officers and others in matters affecting the government. —Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer, or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

"This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress." [June 25, 1948, c. 645, § 1, 62 Stat. 697; May 24, 1949, c. 139, § 6, 63 Stat. 90; repealed by Act Oct. 23, 1962, P.L. 87-849, § 2, 76 Stat. 1126, "except as [it] may apply to retired officers of the armed forces of the United States."] (18 U.S.C. 281)

3. Military Appropriation Act of 1941, Act of June 13, 1940, 54 Stat. 350, 355:

> "* * * No payment shall be made from money appropriated in this Act to any officer on the retired list of the Army who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Army, or the War Department any war materials or supplies. * * *"

4. Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361):

> "* * * That no payment shall be made from appropriations made by Congress to any retired officer in the Navy or Marine Corps who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Navy or the Navy Department any naval supplies or war material."

May 17, 1963
Number 5500.7
GC,DoD

DEPARTMENT OF DEFENSE DIRECTIVE

Subject

Standards of Conduct

* * * * * * * * * *

XIII. CONFLICT OF INTERESTS LAWS

* * * * * * * * * *

C. *Former Officers or Employees*

1. ***Definition.*** The term "former officer or employee" includes those full-time civilian officers or employees who have left Government service, special Government employees who have left Government service, retired regular officers and reserve officers released from active duty. It does not include enlisted personnel.

2. *Prohibited Activities.* Inclosure 3 B contains a more detailed discussion of the criminal law. In general, a former officer or employee is subject to the following major prohibitions:

a. He may not, at any time after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (See 18 U.S.C. 207(a)).

b. He may not, for one year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which are within the boundaries of his official responsibility during the last year of his Government Service (See 18 U.S.C. 202(b) and 207(b)). This temporary restraint, of course, gives way to the permanent restriction described in paragraph *a.*, if the matter is one in which he participated personally and substantially.

D. *Retired Regular Officers*

1. *Prohibitions.* Inclosure 3 C contains a summary of the laws applicable to retired regular officers. In general, a retired regular officer is subject to the following major prohibitions:

a. As an officer whose "employment has ceased," he may not engage in the prohibited activities listed in Paragraph C above (See 18 U.S.C. 207).

b. He may not, at any time, assist in prosecuting a claim against the United States if he worked on that claim while on active duty (See 18 U.S.C. 283).

c. He may not, within two years after his retirement, assist in prosecuting a claim which involves the department in whose service he holds a retired status (See 18 U.S.C. 283).

d. He may not at any time, sell anything to the department in whose service he holds a retired status (See 18 U.S.C. 281).

e. He may not, within three years after retirement, sell supplies or war materials to any agency of the DoD, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service (See 37 U.S.C. 801(c), as amended October 9, 1962, P.L. 87-777, formerly 5 U.S.C. 59(c)). (See definition of "Selling", page 7, Inclosure 3).

2. *Required Statement of Employment.*

a. Each regular retired officer of the armed forces shall file with the Military Department in which he holds a retired status a Statement of Employment (DD Form 1357). Each regular officer retiring hereafter shall file this Statement within thirty days after retirement. Whenever the information in the statement is no longer accurate, each such officer shall file a new DD Form 1357, (Inclosure 6).

b. The Military Departments shall appropriately review the Statements of Employment to assure compliance with applicable statutes and regulations.

• • • • • • • • • • •

(Incl. 3-C)

SUMMARY OF LAWS APPLICABLE TO RETIRED REGULAR OFFICERS NOT ON ACTIVE DUTY

I. Prohibited Activities.

A. *Matters Connected With Former Duties or Official Responsibilities.* A retired regular officer not on active duty is considered to be a "former officer" for the purposes of 18 U.S.C. 207 and therefore, the prohibitions discussed in paragraph XIII C and Inclosure 3B apply to him.

B. *Claims.* A retired regular officer of the armed forces may not, within two years of his retirement, act as agent or attorney for prosecuting any claim against the Govern-

ment, or assist in the prosecution of such a claim or receive any gratuity or any share of or interest in such claim in consideration for having assisted in the prosecution of such a claim, if such claim involves the department in whose service he holds a retired status. Nor may a regular retired officer at any time act as an agent or attorney for prosecuting any claim against the Government or assist in prosecution of such claim, or receive any gratuity or any share of or interest in such a claim in consideration for having assisted in the prosecution of such claim, if such claim involves any subject matter with which he was directly connected while on active duty (See 18 U.S.C. 283).

C. *Selling*

1. A retired regular officer is prohibited, at all times, from receiving or agreeing to receive any compensation for representing any person in the sale of anything to the Government through the department in whose service he holds a retired status (See 18 U.S.C. 281).

2. 37 U.S.C. 801(c) as amended October 9, 1962, P. L. 87-777, formerly 5 U.S.C. 59(c) provides:

"No payment shall be made from appropriations in any Act to any officer on the retired lists of the Regular Army, Regular Navy, Regular Marine Corps, Regular Air Force, Regular Coast Guard, Coast and Geodetic Survey, and Public Health Service for a period of *three* years after retirement who for himself or for others is engaged in the selling of or contracting for the sale of or negotiating for the sale of to any agency of the Department of Defense, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service any supplies or war materials."

For the purpose of this statute, "selling" means:

a. Signing a bid, proposal, or contract;

b. Negotiating a contract;

c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:

(1) Obtaining or negotiating contracts,

(2) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or

(3) Settling disputes concerning performance of a contract, or

d. Any other liason activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person.

However, it is not the intent of this Directive to preclude a retired regular officer from accepting employment with private industry solely because his employer is a contractor with the Government.

* * * * * * * * * *

STATEMENT OF EMPLOYMENT
(Regular Retired Officers)

1. I am a regular retired officer of the .....,
(Department)

and was retired on .....
(Date)

2. I ☐ am ☐ am not employed. *(If employed, or self employed, complete the rest of this item; if more than one employer, list complete information for each employer on a separate sheet).*

a. My employers name and address is

b. My employer sells, or offers for sale, to agencies *(including nonappropriated fund activities)* of the Department of Defense, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service the following types of products or services:

c. My position title is

d. My duties are, briefly *(a complete description of your job, a copy of your employment contract, or any other pertinent information, may be attached):*

e. My duties do not involve selling to the Government in violation of the statutes and policies cited in the regulation received.

3. I have received a copy of DOD Directive 5500.7, or the regulation issued by my department implementing that Directive.

4. I will promptly file a new Statement of Employment whenever the information in this Statement is no longer accurate.

....
Signature Date

....
Name *(Typed or Printed)* File/Service Number

Previous Edition of This Form Is Obsolete.

Form
DD 1 May 63 1357

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742-482—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 236

JOSEPH K. TAUSSIG, JR., PETITIONER

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court denying petitioner's application for a three-judge court (J.A. 28)[1] is reported at 219 F. Supp. 757. The order of the district court granting summary judgment in favor of respondents (J.A. 46) is not reported. The judgment order of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1964. The petition for a writ of certiorari

[1] "J.A." references are to the Joint Appendix submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

was filed on July 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 281 prohibits a retired officer of the Armed Services from representing any person for compensation in the sale of anything to the government through the department in whose service he holds a retired status.

2. Whether 18 U.S.C. 281 constitutionally applies to regular but not to reserve retired officers.

3. Whether petitioner has unconstitutionally been compelled to incriminate himself by Department of Defense Directive 5500.7, requiring retired regular officers of the Armed Forces to disclose their employment duties and to declare that they do not involve selling to the Government in violation of law.

STATUTE INVOLVED

18 U.S.C. 281 provides:

> *Compensation to Members of Congress, officers, and others in matters affecting the Government*
>
> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirect-

ly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person especially excepted by Act of Congress.[2]

STATEMENT

This action seeks to challenge a Directive of the Department of Defense stating that Section 281 of the Criminal Code (18 U.S.C. 281) places restrictions upon the conduct of retired regular military officers seeking to deal with the United States. The first paragraph of Section 281, enacted in 1864 (Act of June 11, 1864, 13 Stat. 123), generally prohibits an "officer" of the United States from receiving compensation for dealing with the United States. Criminal penalties are imposed. The second paragraph of Sec-

[2] By Section 2 of Pub. L. 87-849, October 23, 1962, 76 Stat. 1126, Section 281 was repealed "except as [it] may apply to retired officers of the armed forces of the United States" and replaced by 18 U.S.C. 203.

tion 281 was added in 1940 (Act of October 8, 1940, 54 Stat. 1021). Its first sentence excepts from "the provisions of this section" "[r]etired officers of the Army, Navy, Marine Corps, and Coast Guard of the United States, while not on active duty." Its second sentence provides that "nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." In 1962, Section 281 was supplanted by other legislation "except as [it] may apply to retired officers of the armed forces of the United States." Act of Oct. 23, 1962, § 2, 76 Stat. 1126. The Department of Defense Directive involved in this case, Number 5500.7 (May 17, 1963), interprets Section 281, as it now stands, to prohibit a regular retired officer "from receiving or agreeing to receive any compensation for representing any person in the sale of anything to the Government through the department in whose service he holds a retired status."

Petitioner is a retired Captain of the regular Navy. Following his retirement, he was employed as a government representative by defense contractors (J.A. 39–40). In 1962, he became president of "Taussig Associates Government and Industry Consultants and Representatives" (J.A. 25), "representing firms, corporations, and companies which sell material and supplies to the Departments of the Armed Services" including the Navy Department (J.A. 43–44). On Department of Defense Form 1357,[3] filed on August

[3] Pursuant to Department of Defense Directive 5500.7, Form 1357 (Statement of Employment) must be filed by each regular retired officer with the Military Department in which he holds a retired status.

16, 1962, petitioner informed the Navy Department that his duties consisted of (J.A. 26):

> Currently: Attempting to find clients who might profit from utilizing my knowledge of government, industry, marketing analysis skills, legal training, writing ability, technical abilities, operational know-how, and organizational know-how.
>
> Future: Contracting for personal services in the above premise as a consultant on an ad hoc basis, or a Representative on a term contract basis.

On January 10, 1963, petitioner filed this action for a declaratory judgment in the District Court for the District of Columbia. Petitioner sought to have 18 U.S.C. 281, and Department of Defense Directive 5500.7 declared "a nullity" (J.A. 11). Subsequently, he moved that a three-judge court be convened to consider the several constitutional questions which he had also asserted.[4] The application was denied on June 7, 1963, by the district court which, in a detailed opinion, examined and rejected each of petitioner's constitutional attacks (J.A. 28). Thereafter, petitioner confined his attack to the allegedly erroneous interpretation of 18 U.S.C. 281 by the Department of Defense. On July 15, 1963, petitioner's motion for summary

[4] In particular, petitioner alleged that 18 U.S.C. 281 is unconstitutional on account of vagueness or for failing explicitly to require *mens rea* and that both 18 U.S.C. 281 and 10 U.S.C. 802(4) unconstitutionally distinguish between regular retired officers and reserve retired officers. The latter provision subjects "[r]etired members of a regular component of the armed forces who are entitled to pay" to the Uniform Code of Military Justice, 10 U.S.C. 801, *et seq.*

judgment was denied and that of respondents was granted (J.A. 46). The Court of Appeals affirmed, *per curiam*, in a judgment order (Pet. App. 1a).

ARGUMENT

None of the attacks which petitioner makes upon the Department of Defense Directive is substantial. In addition, there is considerable doubt whether petitioner's suit at this time presents a case or controversy properly subject to judicial consideration. There is therefore no occasion for further review.

Petitioner attacks the Department of Defense Directive in this Court on three grounds: (1) that the Directive classifies as prohibited conduct which is not prohibited by Section 281; (2) that Section 281 cannot be applied to regular retired officers but not to reserve retired officers; (3) that the portion of the Directive requiring retired regular officers to file statements describing their duties and declaring that they do not involve selling to the government in violation of Section 281 violates the Fifth Amendment

1. Petitioner argues (Pet. 10–12) that the second sentence of the second paragraph of Section 281, which provides that "[n]othing herein shall be construed to allow" certain sales activities by retired officers, does not constitute a prohibition upon conduct, but is merely a savings clause intended to preserve the effectiveness of two separate provisions of the United States Code which deprive retired officers of pay while selling supplies or war materials to their departments. (37 U.S.C. 801 (b) and (c).) This interpretation is plainly incorrect. The proviso relied upon by petitioner "obviously" means that a re-

tired regular officer will "violate the section if he is 'representing' someone else in the 'sale' of anything to the United States 'through' his former department." *United States* v. *Gillilan*, 288 F. 2d 796, 797 (C.A. 2) (L. Hand, J.), certiorari denied *sub nom. Apex Distrib Co.* v. *United States*, 368 U.S. 821. This is not to say that the proviso itself constitutes a prohibition but that the Congress realized that such conduct is prohibited by the earlier provisions of Section 281.

The meaning of the proviso relating to retired officers is shown by the history of Section 281. The second paragraph of Section 281 was added in 1940, in response to the decision in *Morgenthau* v. *Barrett*, 108 F. 2d 481 (C.A.D.C.) (1939), certiorari denied, 309 U.S. 672, which held that retired regular Army officers are officers employed by the United States within the meaning of the predecessor to Section 281 (18 U.S.C. 203 (1940 ed.)). As the result of this decision, all the provisions of the first paragraph of Section 281 would have fully applied to retired regular officers. By the 1940 amendment Congress intended to relieve retired officers "of the handicap of that court holding" which would "exclude business executives and accountants on a salary basis, as well as lawyers charging fees, from appearing before Departments, bureaus, commissions, and other agencies of the Government in behalf of business concerns, should they happen to be retired officers."[5] Congress, however, desired to retain the applicability of Section 281 in one particular: where retired officers might seek to participate in sales to the government *through the department in whose service they hold a retired status.* The

[5] 86 Cong. Rec. 12757.

second sentence of the 1940 amendment (presently the second sentence of the second paragraph of Section 281) effectuates that purpose. As stated by the House Committee on Military Affairs, which added this proviso to the 1940 Amendment (H. Rep. No. 2330, on H.R. 9024, 76th Cong., 3rd Sess., p. 1):

> The amendment adopted by the committee is intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department. It applies only to representation in the actual sale of goods, and does not apply to employment and the other activities of any corporation or other person such as manufacturing.

2. Petitioner's second contention appears to be directed at the fact that the Defense Department's Directive interprets 18 U.S.C. 281 as applying to regular retired officers but not to reserve retired officers. (Pet. 14) The Department's interpretation, however, is compelled by two statutes which, in effect, exempt retired *reserve* officers from the provisions of Section 281.[6] The justification for this distinction between reserve and regular officers is manifest. Regular officers, because of their extensive active service, have

[6] 5 U.S.C. § 30r(c): "* * * Membership in a reserve component of the armed forces or in the National Guard does not prevent a person from practicing his civilian profession or occupation before, or in connection with, any department of the United States." 5 U.S.C. § 30r(d): "When he is not on active duty, or when he is on active duty for training, a Reserve is not considered to be an officer or employee of the United States or a person holding an office of trust or profit or discharging any official function under, or in connection with, the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

opportunities to become closely associated with those in their departments who are responsible for military procurement. Reserve officers, who in the main fulfill their active duty obligation through summer tours and weekly or monthly meetings, do not enjoy this opportunity. Accordingly, as the district court noted in ruling on petitioner's application for a three-judge court (J.A. 35), "[i]t is 'plainly insubstantial' to contend that this distinction is unconnected with a rational legislative purpose, is invidiously discriminatory, or violates the due process clause of the 5th Amendment in any other way."

3. Petitioner's third contention (Pet. 9) seems to be that the "Statement of Employment" required by the Department of Defense Directive of all regular retired officers (Pet. 5a, 7a-8a) compels petitioner to incriminate himself in violation of the Fifth Amendment. The required statement must be filed within thirty days of retirement and thereafter whenever the prior filed statement becomes inaccurate. The statement must include a description of the officer's employment and a statement that the officer's civilian duties "do not involve selling to the Government in violation of the statutes and policies cited in the regulation received [Directive No. 5500.7]" (Pet. 8a). Petitioner has already filed this Statement of Employment with respect to his present position as president of "Taussig Associates" (J.A. 25–26). As for the future, the complaint fails (even if we assume that equitable relief would be available in advance of an attempt to prosecute) because there is no allegation that there is any present or imminent probability that petitioner will be called upon to file a new statement.

4. Finally, petitioner's entire challenge to the Department of Defense Directive states no case or controversy appropriate for judicial resolution. Except for the obligation to file a Statement of Employment, which petitioner has already filed, the Directive places no obligations upon petitioner but is merely interpretive of the law with respect to selling activities by retired officers. Petitioner conceded in his complaint below that "no outstanding criminal actions against plaintiff are currently existing, or contemplated by defendants" (J.A. 3). Further, "no investigation, charge, trial by court-martial or other adverse action * * * is now pending in the Department of the Navy and none is contemplated." (Affidavit of Undersecretary of the Navy, Paul B. Fay, Jr., J.A. 19). In these circumstances petitioner is not entitled to an abstract adjudication regarding the scope of Section 281. *United Public Workers* v. *Mitchell,* 330 U.S. 75.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964